

Episode 47

With respect to laws related to Agricultural Reforms, prior to our joining the Federal Shariat Court, the late Justice Aftab had issued a verdict that the Constitution had granted protection to these laws and that they were thus out of scope of the Federal Shariat Court. I was of the view that while the Constitution *is* out of scope of this Court, those laws that the Constitution had granted protection could not be considered the Constitution itself. Such laws were thus not out of scope of this Court. However, this verdict had already been issued before our joining the Court. Nonetheless, after our joining, a case had been filed related to this, and Justice Aftab wrote his verdict to it in which he gave reference to his past verdict that declared these laws to be out of the Court's scope. When his verdict came to me for signature, I wrote a short note to it in which I stated that in my opinion, that verdict should be reviewed. (Later, the Supreme Court unanimously issued a verdict in favour of my opinion).

The late Justice Aftab would dislike my disagreeing with him in this manner, and he had also expressed some umbrage at this conduct of mine, i.e. as to why I disagreed with him even in purely legal matters. Rather, at one instance he even said: "In this matter, my opinion is the final word." However, firstly, difference of opinion among judges and writing dissenting verdicts is neither something unheard of in legal convention nor is it an apt occasion to take offense. Secondly, he probably considered his opinion in legal matters as the "final word" compared to mine because certainly he was much more knowledgeable and experienced in these matters. However, when Shariah-related matters would come under discussion, he would not be prepared to give the opinions of the scholars the same weight as he would give his own opinion in legal matters, and he would sometimes also needlessly argue over Shariah-related matters. His temperament also had some anger which would sometimes reflect in his words while debating over some point of disagreement. Due to these reasons, despite maintaining outwardly courtesy, a kind of tension would frequently build up. His somewhat annoyance with me would sometimes affect his administrative decisions as well.

Initially, this Court could rule on existing laws only when a citizen filed a petition challenging them. The Court could not issue verdicts regarding existing laws of its own accord. However, as I have mentioned above, such petitions were rarely received. Nevertheless, later the Court received mandate to take suo motu notice of such laws. At that point, we decided to examine various laws by ourselves, and for those laws that appeared to be contrary to the Quran and Sunnah, to issue a general notice and invite scholars and lawyers as well as the government to present their arguments before the Court. To this end, at the initiative of Justice Zahoorul Haq, I was assigned the “Contract Act” to analyse, and to point out those laws that appear to be contrary to the Quran and Sunnah. The reason for selecting these particular laws was that they form the foundation of most civil dealings, and if these were corrected, numerous civil dealings could be reformed. I thus began this work, and after quite some hard work which involved referring to numerous resources, prepared a detailed text. It had been decided for this draft to be presented to all the judges for review, after which a meeting of all judges would be convened to discuss it. And this meeting was thus convened.

I have mentioned before that the late Justice Aftab was not in favour of making any major changes to the existing laws. Consequently, throughout the meeting, whenever I would point out some flaw from Shariah point of view in any law, he would spontaneously begin defending it, and would often not be ready to even consider my point. This occurred for all the laws, so-much-so that he did not find any law in the Contract Act to be contrary to the Quran and Sunnah. I would also be surprised that Justice Malik Ghulam Ali (may Allah have mercy on him) would support him in every point. While discussing some point, if I would cite any of the noble *fuqahā*, sometimes the late Justice Aftab would even become irate. I continued expressing tolerance at this conduct for several days, but at one point, he openly said something in the presence of everyone that was not only inappropriate, but unbearable for me, and that contained connotations of contempt for the *fuqahā*. This inflamed me somewhat. I put the file before him and said: “If this is your conduct, then excuse me, but I cannot work with you. You can continue working according to your way and I will work according to my way.” Saying this, I left the meeting and returned to my chamber.

As the Chief Justice, he was indeed senior to me, and he also possessed administrative powers. However, as far as court-related authority and scope of power were concerned, there was no difference between us. I possessed the same authority to issue verdicts as him. I thus decided to work on my own, without him. After I returned to my room, Justice Zahoorel Haq and Justice Chaudhary Siddiq came to me and apologized for what happened, and said: "Justice Aftab possesses a sharp temperament. Do not be disheartened due to him. InshāAllāh we will try to talk to him later." They later talked to Justice Aftab, whereby he promised to redress my grievance and promised not to adopt such a conduct in the future. Accordingly, when I arrived for the hearing of a different case the next day, he greeted me with more warmth than usual, and while he did not express any words of apology, he invited me to work with him and said to me: "We are led by you".

After this, there was indeed much change in his conduct and I resumed participating in the discussions with him. However, this work was still in progress when I was appointed in the Shariat Appellate Bench of the Supreme Court, and thus this work remained incomplete.

Appointment in the Supreme Court

The head of the then-newly constituted Shariat Appellate Bench of the Supreme Court was Justice Muhammad Afzal Zullah (who later retired as the Chief Justice of Pakistan). It also included Justice Naseem Hasan Shah and Justice Shafi ur Rahman, while Hadhrat Pir Muhammad Karam Shah Azhari (may Allah have mercy on him) and myself were included as scholar judges. *Al-Hamdulillāh* we all had very good rapport with each other. We also had difference of opinion in some matters, but this disagreement remained within its limits.

In those days, the Supreme Court was established in a building in Rawalpindi. A rest house of the Court used to exist in a bungalow in front of that building. Whenever the Bench would sit, I would stay in that rest house for a week or two, often alone and sometimes with my wife and children.

I got the opportunity to work with more ease of mind after coming to the Supreme Court. As I have mentioned before, I was not much interested in criminal cases; my main interest lay with

those cases in which existing laws had been challenged to be reviewed in light of the Quran and Sunnah. *Al-Hamdulillāh* here I received the chance of deciding many such cases.

During the initial days, the most important case was related to Punjab's and NWFP's laws of *shuf'ah*. The laws of *shuf'ah* in both these provinces had been contrary to the Shariah since a long time, as a result of which the residents of these provinces had been suffering from an unending cycle of lawsuits. For example, one aspect of these laws contrary to the Shariah was that they did not contain any mechanism to verify that the claimant of *shuf'ah* did indeed possess the right of *shuf'ah* according to the conditions set by the Shariah. The Shariah did not grant the right of *shuf'ah* so that people could amass more properties, rather this right was granted for the case where the owner of a property feared that a new owner of a land neighbouring his could harm him. In such a case, he could immediately, without any delay, claim the right of *shuf'ah*. However, the laws in these provinces allowed for the claim of *shuf'ah* to be made within a year. Consequently, if someone sold his property, the buyer would not know if anyone were claiming *shuf'ah* for the property he had purchased for an entire year. It would sometimes happen that someone would claim *shuf'ah* just before one year had elapsed, and thereafter both parties would waste their time and money in lawsuits, and the land would remain hanging for years without reaching a decision as to who would be the rightful owner of the land.

Similarly, the Shariah grants the right of *shuf'ah* either to one who has a share in the land being sold or to one who owns a neighbouring piece of land. However, in the laws implemented in Punjab and NWFP, some additional people had been granted the rights of *shuf'ah* whom the Shariah had not granted these rights.

Some individuals had challenged these laws in the Federal Shariat Court, and prior to our appointment in that Court, the late Justice Aftab Husain had issued a verdict according to which the petition was dismissed and the laws upheld. In his lengthy verdict, he had ruled that there was no problem with those laws from Shariah point of view. An appeal against this verdict had been filed in the Shariat Appellate Bench of the Supreme Court, and its hearing began after our appointment to the Supreme Court. After arguments were presented by lawyers from both sides, the Court reserved its judgement, and Justice Zullah sent the file to Hadhrat Pir Muhammad

Karam Shah (may Allah have mercy on him) to write the verdict. He wrote a rather erudite verdict. In those days, Justice M.H.S Qureshi was also part of our Bench. He disagreed with the verdict written by Pir Karam Shah and wrote a separate verdict, in which he raised certain points that were not very important in themselves but could potentially be appealing for those modern-educated individuals who had not formally studied the Islamic sciences. At the same time, these points were so consequential that once affirmed in Court, they could nullify the Shariah-based economic and financial laws. In one of our meetings, respected Justice Zullah also remarked to this lowly one: "He has presented quite strong arguments." I said: "I also have to write my verdict, so please wait before forming any final opinion regarding this matter." Subsequently, I wrote a detailed verdict in which I also analysed the arguments presented by respected Justice Qureshi. After writing, I sent this verdict to the other judges. After reading it, other judges (Justice Afzal Zullah and Justice Shafi ur Rahman) concurred with it and endorsed it with their signatures, while Hadhrat Pir Karam Shah's verdict had already been written. At long last, the legal verdict issued on the 23rd of February 1986 declared those laws to be contrary to the Quran and Sunnah. According to the Constitution, when the Shariat Bench of the Supreme Court declares any existing law to be contrary to the Quran and Sunnah, it appoints a date until which the government is to amend that law to make it conform with the Quran and Sunnah. In case the government is unable to amend that law by the appointed date, that law is automatically annulled on that date. Thus, the following legal order was issued in relation to the *shuf'ah* laws:

"Appeals no 4 and 5 of 1979 are dismissed, and all other appeals are allowed in terms of the formal last part of the judgment of Maulana Muhammad Taqi Usmani J. If possible, a consolidated law of pre-emption be enacted accordingly till 31.7.1986." (PLD 1986 Supreme Court)

In the wake of this verdict, thousands of criminal cases, due to which hundreds of lands had been left hanging since years in Punjab and NWFP, were dismissed. Thereafter those individuals whose interests were harmed by this change continued to challenge and debate on this ruling in higher courts, and also challenged the amended law that the governments of Punjab and NWFP passed in the wake of this verdict. This matter was thus presented in our Court more than once, and I

wrote a detailed verdict on those petitions as well, one in Urdu and one in English, after which these cases came to an end. These decisions of mine were reported in PLD¹ and have also been published in my book “*Adālatī Faislay*”.

Similarly, another important case was related to *qimār*, in which article No. 294-A of the Pakistan Penal Code was annulled. According to that article, the government lottery was excepted from the prohibition of gambling, and it also granted authority to the provincial governments to issue any specific lottery with a license to operate. In that verdict, a comprehensive definition of *qimār* was presented and thereafter all forms of it were declared to be impermissible and illegal. (PLD 1992 Supreme Court, Pages 166 to 179).

Another law that had continued to be implemented in our country since British rule was the law of “adverse possession”. According to article no. 28 of the Limitation Act, if someone illegally occupied a property for twelve years and the actual owner did not file any claim during this time, the actual owner would automatically relinquish his ownership in favour of the illegal occupier. I wrote a comprehensive verdict on this topic as well, in the wake of which the law of “adverse possession” was abolished. (NLR 1991 SD, page 700)

The Pakistan Penal Code was entirely based on the British-formulated Indian Penal Code. It did not contain the Hudood and *Qisās* laws. For implementing the Hudood laws, the Hudood Ordinance had already been enacted on the recommendations of the Council of Islamic Ideology during the time of President Zia-ul-Haq, which I have mentioned in detail previously. In order to implement the Islamic laws of *Qisās* and *Diyat*, I had prepared and presented an initial draft of those laws during my appointment in the Council of Islamic Ideology. However, before it could be implemented, I had transferred to the Federal Shariat Court. Here, some individuals had

¹ Since judgements made by higher courts become precedent for future cases, if a case contains some important legal point, the ruling judge writes: “this verdict is permitted for publication”. There are several monthly magazines in our country that publish these judgments, among which Pakistan Legal Decisions (short for PLD) is more well-known. Several other magazines also publish selected verdicts.

challenged article 302 of the Pakistan Penal Code as being contrary to the Shariah-defined laws of *Qisās* and *Diyat*¹, and that they should thus be amended. I wrote the judgement of this case in quite some detail as well, in which I elucidated upon all those aspects of article 302 that were contrary to the Shariah. This judgement was published in the PLD as well as my book “*‘Adālatī Faislay*”.

When the government decided to implement the laws of *Qisās* and *Diyat* in the wake of this judgement, the initial manuscript of these laws that I had prepared as a member of the Council of Islamic Ideology was made as the base to draft the actual laws. At the request of the Ministry of Law, I was involved in this drafting process. The task of drafting was assigned to the Additional Secretary of the Ministry, Mr. Amjad. I participated in this task with him, and it was eventually implemented in its final form after several weeks of sittings. While this final version retained the basic laws mentioned in my original draft, several points had been omitted, and the order of laws stated in it had also to be altered, as unlike the Hudood Ordinance, these were to be made a part of the Pakistan Penal Code. Anyway! In this manner, *Al-Ḥamdulillāh* most of the laws in the Pakistan Penal Code were reformed to comply with the Shariah.

Here, I do not intend to mention all the decisions I had written in those days. Most of those decisions have been collected in my book “*‘Adālatī Faislay*”. Nonetheless, these few examples were described so that one could get an idea of the significance of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, i.e. as to how effective they could be in reforming the laws and bringing them in line with Islamic principles. I do not recall any contemporary law being reformed and brought in line with the Shariah by way of the Parliament except declaring the Qadianis to be non-Muslims, but several laws were changed through these

¹ It is regrettable that these petitions to change the laws were not filed by any religious circle or group, rather they were filed by those individuals who had killed a relative and would thus face the death penalty, but had obtained a statement of pardon from the heirs of the deceased. However, the crime under article 302 of the Pakistan Penal Code did not admit any pardon. They thought that under Islamic laws, they could reach an agreement with the heirs of the deceased and thus escape the death penalty, so they filed this petition.

Courts based on academic foundations. I still regret the fact that the religious circles and groups of the country did not pay any attention to take advantage of these institutions and endeavour to reform the laws through them. The petitions for which we issued the verdicts were mostly filed by those individuals who hoped to receive some personal benefit through Islamic laws. God only knows how many times I appealed to the noble scholars and heads of religious groups to form a committee of scholars and lawyers to examine contemporary laws, and to file petitions against those laws that were contrary to the Shariah. I even passed a general list of laws to some individuals for them to examine. However, not a single petition was filed by them during my entire seventeen-year tenure as a judge. This resulted in legal circles forming an impression that people were not interested in challenging any laws on the basis of Shariah. The Chief Justices of the Court, who possessed the authority to assign any case to any bench, had also adopted a neglectful attitude towards such cases. They would not schedule such petitions for hearing for a long time, and as a result our Bench would mostly be assigned criminal cases. I requested the Chief Justices again and again: “the main purpose of the Shariat Appellate Bench is to hear appeals against contemporary laws. Criminal laws are only supplementarily assigned to it, as is clear from the order in which they are mentioned in the Constitution. Such laws should thus be prioritized.” However, almost each time they would reply: “there are more people asking about their criminal cases while no one asks as to why their petitions against existing laws are taking a long time to hear.” Rather, secular-minded individuals would derive from this that the public is uninterested in implementing Islamic laws. Though I would reply: “we should not schedule the hearing of cases based on people’s demands, rather we should do it based on the date of filing”, these words would often go unheeded. As a result, such cases would be postponed for years. No one would follow up on them or demand for their hearing from outside.

Besides these, the final appeal with respect to the Hudood Ordinance would also come to us. Several *fiqh*-related and legal issues would come under discussion in these cases as well. Their ultimate verdicts were also issued during that time. These decisions have also been published in legal magazines, and are now being published in the new edition of my book “*Adālatī Faislay*”.